QUESTION PRESENTED

Does a State violate the Ex Post Facto Clause by retroactively eliminating statutorily-mandated opportunities for consideration of a prisoner's release on parole?

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STATEMENT OF THE CASE

In 1982, a California court sentenced respondent Jose Ramon Morales ("Morales") to a term of 15 years to life in prison. Morales received this sentence after pleading "no contest" to second-degree murder for an offense committed in 1980. The California Penal Code provides that offenders in Morales' position are eligible for parole release after serving ten years of confinement, *see* Cal. Penal Code §§ 190 (West 1988), 2931(a) (West 1982), a period that Morales completed in 1990. By statute, responsibility for determining the timing of parole release, and for fixing the actual length of confinement for parole-eligible offenders such as Morales, rests with the California Board of Prison Terms. *See generally id.* §§ 3000-02, 3040-65 (West 1982 & Supp. 1994).

The Penal Code requires the Board of Prison Terms to conduct an initial parole hearing one year before the prisoner's "minimum eligible parole release date." Cal. Penal Code § 3041(a) (West 1982). The state statute requires the Board to find the offender "suitable" for parole at this hearing, and to set a release date, unless the Board determines that "consideration of the public safety require[s] a more lengthy period of incarceration." *Id.* § 3041(b) (West 1982).[1] At the time Morales committed his offense, the

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[1] California law accords prisoners extensive procedural rights at parole suitability hearings. The prisoner must be permitted to examine his parole suitability file in advance, Cal. Penal Code § 3041.5(a)(1) (West 1982 & Supp. 1994); must "be permitted to be present, to ask and answer questions, and to speak on his or her own behalf," *id.* § 3041.5(a)(2); and must "be permitted to request and receive a stenographic record of all proceedings," *id.* § 3041.5(a)(4). In addition,

Penal Code required the Board, in the event that it declined to set a release date at this initial hearing, to permit the prisoner to appear at a hearing each year thereafter and urge his or her suitability for parole, until a parole release date was fixed. *Id.* § 3041.5(b)(2) (*see* Joint Appendix ("J.A.") 3).

In 1981, after Morales committed his offense, the California Legislature retroactively changed this statutory mandate to permit the Board to deny annual parole suitability hearings to prisoners convicted of more than one offense involving the taking of human life. Under this authority, the Board can direct such prisoners to serve as much as three years of confinement before any further reconsideration of their release, provided that the Board finds that it is "not reasonable" to expect parole to be granted in the intervening period. 1981 Cal. Stat. ch. 1111 § 4, *codified at* Cal. Penal Code § 3041.5(b)(2) (West 1982). Because the Penal Code requires the Board to hold a parole consideration hearing before it sets a prisoner's parole release date, the amendment deprives the prisoners to whom it applies of any possibility of release during this period of delay. *See generally id.* §§ 3041-41.4 (West 1982 & Supp. 1994).

The California Legislature's actions are consistent with what appears to be a nationwide trend to defer parole

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a prisoner serving a life sentence is entitled to be represented by counsel. *Id.* § 3041.7.

hearings,[2] and to ensure that greater portions of sentences are served behind bars.[3] In fact, the 1981 retroactive amendment was the first of four successive measures by the California Legislature that delay the hearings at which prisoners' parole release dates are set. Each legislative action either further lengthened the time between parole hearings,

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[2] *See, e.g.*, N.H. Rev. Stat. Ann. § 651:20(I)(a) (Supp. 1993) (reducing frequency with which violent offenders can petition for suspended sentences from two to four years); Mich. Comp. Laws Ann. § 791.234 (West 1992) (reducing frequency of parole interviews, and delaying initial interview, for prisoners serving parolable life sentences); Ill. Rev. Stat. ch. 38, ¶ 1003-3-5(f) (Supp. 1988) (reducing hearing frequency from every year to every three years where it is deemed not reasonable to expect that parole would be granted in intervening years); S.C. Code Ann. § 24-21-645 (Supp. 1987) (reducing hearing frequency from annually to biannually); Ariz. Rev. Stat. Ann. § 31-411(B) (1978); Ariz. Comp. Admin. R. & Regs., Rule R5-4-602 (1980) (increasing permissible interval between commutation hearings from one to two years); *see also Akins v. Snow*, 922 F.2d 1558, 1560 & n.5 (11th Cir.) (discussing 1986 amendment to Georgia parole board regulations changing parole hearing frequency from one to eight years), *cert. denied*, 501 U.S. 1260 (1991).

[3] Petitioners make no attempt to conceal the punitive motivations behind this trend. Indeed, in their "Summary Of The Argument," they expressly urge the Court to "reexamine" the Court's ex post facto cases "[i]n view of the national trend towards the implementation of harsher penalties and conditions of confinement for offenders and inmates." (Petitioners' Brief on the Merits ("Pet'rs Br.") at 11; *see also* Br. of *Amici* The States of Pennsylvania *et al.* at 12-13 & nn. 4-6 (listing statutes limiting the availability of parole and otherwise imposing harsher, more rigid sentences).)

expanded the class of prisoners subject to such delays, or both.[4]

In accordance with the Penal Code, the Board of Prison Terms held a hearing to determine Morales' initial suitability for parole on July 15, 1989. It found him unsuitable for release at that time. Applying the 1981 amendment to § 3041.5(b)(2), the Board also found that it was "not reasonable" to expect parole to be granted to Morales in the ensuing three years. (Ex. B, Supp. App. to Pet. for Cert. at 47.) In so doing, the Board eliminated Morales' eligibility for a parole reconsideration hearing for the maximum three-year period permitted.

Following the Board's three-year deferral, Morales sought a writ of habeas corpus in the United States District Court for the Central District of California. Morales argued, among other things, that the Board's refusal to consider him for parole release on an annual basis violated the Ex Post

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[4] In 1982, the California Legislature amended Penal Code § 3041.5(b)(2) to permit the Board of Prison Terms to defer consideration of any prisoner for two years, rather than one year, if the Board finds it "not reasonable" to expect a release date to be set in the intervening period. 1982 Cal. Stat. ch. 1435, § 1. In 1990, the Legislature extended the Board's authority to deny parole hearings for up to five years to offenders convicted of more than two offenses involving the taking of a life. 1990 Cal. Stat. ch. 1053, § 1. In 1994, the Legislature replaced the provisions added in 1981 and 1990 with a much broader provision allowing the Board to defer parole consideration for as many as five years for all offenders imprisoned for murder. 1994 Cal. Stat. ch. 560, § 1. Notably, while the California Legislature provided that the 1990 amendment would have prospective effect only, the five-year deferral authority added in 1994 was made applicable to previously committed offenses. *See* 1990 Cal. Stat. ch. 1053, § 2; 1994 Cal. Stat. ch. 560.

Facto Clause of Article I, Section 10, Clause One of the United States Constitution. A magistrate judge recommended that the writ be granted as to Morales' ex post facto claim. The District Court, however, declined to adopt the magistrate judge's recommendation and denied Morales' ex post facto claim, as well as the other claims in the petition.

The Ninth Circuit unanimously reversed. Recognizing that parole in California can occur only after a hearing before the Board of Prison Terms, the Court of Appeals reasoned that a law that suspends or eliminates parole hearings necessarily precludes "the possibility of parole altogether in the period between hearings." *Morales v. California Dep't of Corrections*, 16 F.3d 1001, 1004 (9th Cir. 1994). The Ninth Circuit rejected the State's assertion that the burden fell on Morales to show a substantive entitlement to -- or a likelihood of -- parole in the intervening years in which he was denied annual hearings. *Id.* at 1005. The court reasoned that imposition of such a burden on the offender would be inconsistent with both the historical premises of the Ex Post Facto Clause and longstanding decisions of the Supreme Court. Quoting this Court's decision in *Weaver v. Graham*, 450 U.S. 24, 30 (1981), the Ninth Circuit observed: "'Critical to relief under the ex post facto clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" 16 F.3d at 1005. The Court of Appeals therefore held that a State may not retroactively eliminate or postpone opportunities for parole consideration without violating the Ex Post Facto Clause. In so holding, the Ninth

Circuit joined every other federal appellate court that has considered the issue.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause enjoins a State from applying any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to [a] crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Where the State prescribes a fixed quantum of punishment for an offense, that punishment may not retroactively be enhanced. Where the State prescribes a range of possible punishments for a criminal act, and leaves the selection of the actual punishment imposed in a given case to a sentencing judge or to corrections officials, the Ex Post Facto Clause prevents a State from retroactively imposing a more onerous "standard of punishment" for previously committed offenses. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). In reviewing ex post facto challenges, this Court has repeatedly rejected assertions by the State that a more onerous retroactive statute may be upheld because the offender might have received equivalent punishment under the predecessor standard. If a State changes the "standard of punishment" for a previously committed crime and thereby forecloses opportunities for reduced confinement available to the offender under prior law, it acts in violation of the Ex Post Facto Clause. *Id.* at 401-02.

Under California law, the State's Board of Prison Terms decides when a parole-eligible offender will be released and, by statute, can grant parole to an offender only following a parole consideration hearing. At the time of Morales' offense, if the Board denied release at a prisoner's

initial parole hearing, state law mandated that the Board reconsider the prisoner for release each year thereafter. Following the commission of Morales' crime, the California Legislature significantly lengthened the period between parole reconsideration hearings for offenders in Morales' position. Under this amendment, such offenders must serve as many as three years of confinement before obtaining a parole reconsideration hearing, rather than the one year period mandated by the prior statute. This change retroactively makes Morales' punishment more onerous in violation of the Ex Post Facto Clause by eliminating opportunities for parole release -- and thus for reduced confinement -- available under the superseded law.

Petitioners incorrectly claim that California's retroactive legislation survives ex post facto scrutiny because it contains "procedural safeguards" that purportedly ensure that parole consideration is not delayed for those with "reasonable" chances of gaining parole. Petitioners' assertion ignores this Court's cases holding that an offender need not have a "vested right" to reduced confinement under the superseded regime in order to challenge retroactive application of a more onerous standard of punishment. *See, e.g., Weaver*, 450 U.S. at 29. Moreover, petitioners' proposal that ex post facto protection against retroactive postponement of parole eligibility be afforded only to those offenders who can demonstrate a "reasonable" chance of early release would involve the federal courts in speculative inquiries into the probable determinations of administrative bodies in thousands of individual cases. At bottom, petitioners urge recognition of a *de minimis* exception to the Ex Post Facto Clause's proscription, but they proffer no support for such an

exception in the text of the Clause itself or in the Court's decisions interpreting it. The suggestion should be rejected.

ARGUMENT

Nearly two centuries ago, Justice Chase wrote in *Calder v. Bull*, 3 U.S. (3 Dall.) at 390, that the Ex Post Facto Clause prohibits "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." The Supreme Court has reaffirmed this pronouncement time and again. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 43 (1990) ("Legislatures may not retroactively alter the definition of crimes *or increase the punishment for criminal acts*" (emphasis added)). Under settled principles, a law changing the punishment for existing crimes is within this prohibition if it makes more onerous the "standard of punishment" applicable to a previously committed crime. *E.g., Lindsey*, 301 U.S. at 401.

The California Legislature retroactively heightened the standard of punishment applicable to the crime for which Morales was convicted in 1982 by permitting the Board of Prison Terms to eliminate, for as many as three years, the parole reconsideration hearings that were formerly guaranteed to Morales on an annual basis. This conclusion follows inescapably from the function of parole release, and from an unbroken line of cases holding that the Ex Post Facto Clause enjoins retroactive application of enhanced punishment standards even to offenders who cannot demonstrate an entitlement to lesser punishment under prior law.

I. ELIGIBILITY FOR PAROLE IS AN INTEGRAL PART OF PUNISHMENT FOR EX POST FACTO PURPOSES.

The possibility of parole is integral to, and materially mitigates, a criminal defendant's sentence. This Court's decisions have recognized that a sentence of imprisonment that carries the possibility of parole release is less onerous than a sentence of equivalent length that does not. In light of the character of parole release and its function in determining the length of a prisoner's confinement, a State may not deprive a prisoner of preexisting eligibility for parole without enhancing punishment, and thus offending the Ex Post Facto Clause.

In California, as in many other states, parole consideration is an essential part of the statutory scheme by which periods of confinement are fixed. Rather than specify immutable prison terms, courts mete out sentences qualified by a statutory parole system defining the requirements for early release. Through good behavior in prison and through demonstration of the capacity for responsible behavior in the community, prisoners may exchange the harshness of physical confinement for the comparative leniency of parole. And where judges once attempted to determine the appropriate period of retribution, or predict the timing of an offender's rehabilitation, administrative bodies such as California's Board of Prison Terms now make these determinations long after an offender's sentencing. Parole is, as this Court has described it, "an established variation on imprisonment of convicted criminals." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

The mere possibility of parole release significantly mitigates criminal punishment. For instance, in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court relied on the bare possibility of parole to hold that a sentence of life imprisonment for three theft convictions, each involving less than $125.00 in property, did not violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See id.* at 280-81. Although this Court in *Rummel* specifically recognized that the offender's likelihood of being released on parole was "slim," the mere fact that the offender's sentence technically included the possibility of parole rendered the life sentence sufficiently less onerous to pass muster under the Eighth Amendment. *Id.* at 281.

The Court emphatically reaffirmed this point three years later in *Solem v. Helm*, 463 U.S. 277 (1983), when it found a life sentence that did not carry the possibility of parole to be "significantly disproportionate" to the nonviolent felonies for which it was imposed, and therefore violative of the Eighth Amendment. *Id.* at 303. The Court rejected South Dakota's assertion that the possibility of executive commutation was sufficient to render the sentence comparable to the parole-eligible sentence sustained in *Rummel*, noting that the possibility of parole, unlike the possibility of commutation, is "the normal expectation in the vast majority of cases." *Id.* at 300-01. In language that is particularly relevant here, the Court found a prisoner's "expectation" of parole important for Eighth Amendment purposes because -- in contrast to commutation -- "[t]he law generally specifies when a prisoner *will be eligible to be considered for parole*, and details the standards and

procedures applicable at that time." *Id.* at 300 (emphasis added).[5]

Consistent with the view stated by this Court in *Rummel* and *Solem*, California law expressly recognizes that a sentence of life with a possibility of parole is less onerous than a life sentence that does not include parole consideration. For, absent a finding that statutorily enumerated aggravating circumstances outweigh potentially mitigating circumstances, California law precludes the imposition of a life sentence without the possibility of parole. *See* Cal. Penal Code §§ 190-190.4 (West 1988). And more than simply providing an opportunity for conditional release, parole in California offers the offender an opportunity to extinguish the underlying sentence -- even one of life imprisonment -- and gain a complete discharge from custody. Most offenders, once given conditional release, cannot be required to remain on parole more than three years before they must be discharged altogether. *Id.* § 3000(b) (West 1982 & Supp. 1994). At the time Morales was convicted, the California Penal Code accorded offenders convicted of second-degree murder similar treatment. Thus, even though

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[5] From its institutional beginnings, release on parole has been viewed as an intrinsically less onerous form of punishment than imprisonment. Captain Alexander Maconochie, who in 1840 implemented the first parole system, at Norfolk Island prison in Australia, regarded parole (which was termed a "ticket-of-leave") as a stage of punishment several degrees less burdensome than imprisonment. *See* IV ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 11 (reprint 1974) (1939). The pioneer of the parole system in Spain, Colonel Montesinos, similarly regarded parole as a way for society to "correct" offenders rather than merely "punish" them. *See id.* at 8-9.

he was sentenced to a term of 15 years to life imprisonment, Morales -- if granted release on parole -- cannot be required to serve more than five years in that status prior to being discharged. *Id.*

Not surprisingly, an offender's eligibility for parole release, and the timing of that eligibility, are important considerations in the criminal sentencing process. Judges inevitably account for parole eligibility when fixing the length of sentences within authorized statutory ranges. *See, e.g.*, *Kramer v. United States*, 409 F. Supp. 1402, 1404 (N.D. Ga. 1976).[6] The availability of parole also influences a defendant's willingness to enter a negotiated plea of guilty. As this Court recognized in *Weaver*, "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." 450 U.S. at 32. Indeed, in California, as in many jurisdictions, the timing of an offender's eligibility for parole has been held to be so central to the punishment imposed that the offender may withdraw a guilty plea if he has been misinformed on that

[6] From the earliest experimentation with parole regimes, the availability of parole and other applicable parole rules have been understood to have a significant effect on the length of the underlying sentences to which they attach. *See* IV ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 3-4 (citing Gault, *The Parole System, A Means of Protection*, 5 J. CRIM. L. 802 (1915); Butler, *The Indeterminate Sentence and Parole Law*, INDIANA BULL. CHARITIES & CORR. 8 (1916); and ALCO, INDETERMINATE SENTENCE AND PAROLE 3 (1926)).

subject. *See People v. Tabucchi*, 64 Cal. App. 3d 133, 134 Cal. Rptr. 245 (1976).[7]

It follows that a prisoner's statutory eligibility for parole may not retroactively be withdrawn consistent with the Ex Post Facto Clause. A statutory withdrawal of parole eligibility plainly alters the *authorized* punishment for an offense, even if the release decision is committed to the discretion of a paroling authority, and even though the ameliorative effect of parole on the actual period of confinement served by the offender cannot be determined with precision. As this Court has noted, "'[i]t may be 'legislative grace' for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offenses . . . this is in the nature of an additional penalty.'" *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) (quoting *Durant v. United States*, 410 F.2d 689, 691 (1st Cir. 1969)); *see also Weaver*, 450 U.S. at 30-31 ("even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the

[7] *See also Durant v. United States*, 410 F.2d 689, 693 (1st Cir. 1969) ("the district court should not have accepted the guilty plea without first informing the defendant that conviction upon the plea would make him ineligible for parole"), *cited in Weaver*, 450 U.S. at 32; *Munich v. United States*, 337 F.2d 356, 361 (9th Cir. 1964); *People v. Victorian*, 2 Cal. App. 4th 954, 4 Cal. Rptr. 2d 460 (1992) (inaccurate advice concerning length of parole term entitles defendant to withdraw guilty plea).

offense").[8] The practical reality that parole eligibility typically presages reduced confinement, and not the due process-based notion that a prisoner is without an enforceable right to release, is crucial here. "[O]nly an unusual prisoner," the Court has explained, "could be expected to think that he was not suffering a penalty when he was denied eligibility for parole." *Marrero*, 417 U.S. at 662-63 (citing *United States v. Ross*, 464 F.2d 376, 379 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973) and *United States v. De Simone*, 468 F.2d 1196, 1199 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973)).[9]

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[8] *Marrero* addressed the question whether a provision of law prohibiting parole for certain drug offenders remained applicable to the sentences of those already confined, notwithstanding its repeal by the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Court held, *inter alia*, that a previously sentenced drug offender's ineligibility for parole was part of his "punishment," and thus was a "'penalty, forfeiture, or liability' saved from release . . . by 1 U.S.C. § 109." *Marrero*, 417 U.S. at 660-62.

[9] This question has not proved to be a close one in the state and lower federal courts. Nearly every court to address the issue has held that the availability of parole is "annexed" to the crime such as to implicate ex post facto concerns when modified retroactively. *See, e.g., United States v. Meeks*, 25 F.3d 1117, 1121 (2d Cir. 1994); *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993); *Akins*, 922 F.2d 1558; *Fender v. Thompson*, 883 F.2d 303, 307 (4th Cir. 1989); *Schwartz v. Muncy*, 834 F.2d 396, 398 n.4 (4th Cir. 1987); *Burnside v. White*, 760 F.2d 217, 220 (8th Cir.), *cert. denied*, 474 U.S. 1022 (1985); *Lerner v. Gill*, 751 F.2d 450, 454 (1st Cir.), *cert. denied*, 472 U.S. 1010 (1985); *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. Unit A 1981); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 (7th Cir. 1979); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977); *Greenfield v. Scafati*, 277 F. Supp. 644, 645-46 (D. Mass. 1967), *aff'd*, 390 U.S. 713 (1968) (*per curiam*); *see also Williams v. Board of Parole*, 112 Or. App. 108, 828 P.2d 465, *review dismissed*, 313 Or. 300, 832 P.2d 456 (1992); *Tiller v. Klincar*, 138 Ill. 2d 1, 11, 561 N.E.2d 576, 580 (1990), *cert. denied*, 498 U.S. 1031 (1991).

In short, the elimination of preexisting eligibility for parole, like any other enhancement of punishment, cannot be effected retroactively consistent with the Ex Post Facto Clause.

II. RETROACTIVE POSTPONEMENT OF A PRISONER'S STATUTORY OPPORTUNITY FOR PAROLE CONSIDERATION INCREASES PUNISHMENT IN VIOLATION OF THE EX POST FACTO CLAUSE.

A. Penal Code § 3041.5(b)(2) Effectively Postpones Morales' Parole Eligibility By Delaying Morales' Parole Consideration Hearings.

Parole suitability "hearings" are the touchstone of parole release in California. By statute, the Board of Prison Terms is permitted to fix a date for a prisoner's release from confinement only through such a hearing. *See* Cal. Penal Code §§ 3041, 3041.5, 3042 (West 1982 & Supp. 1994); *see also In re Jackson*, 39 Cal. 3d 464, 468, 703 P.2d 100, 102 (1985). The nature and extent of the procedural steps the Board must take before, during, and after the hearing make this unmistakably clear.[10] What is more, there is no

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[10] For instance, under California law, the Board must provide thirty days' advance notice of the hearing to, *inter alia*, the judge of the court before whom the prisoner was convicted, "the district attorney of the county in which the offense was committed, the law enforcement agency that investigated the case," Cal. Penal Code § 3042(a) (West 1982 & Supp. 1994), and, upon request, "any victim of a crime committed by the prisoner, or . . . the next of kin of the victim if the victim has died," *id.*

statutory or regulatory mechanism, enforceable or not, by which a prisoner may petition for the determination of a release date outside the parole suitability hearing process. Absent a parole suitability hearing, accordingly, there is no statutory opportunity for a prisoner to obtain parole in California.[11]

At the time of Morales' offense, a prisoner found unsuitable for parole at his initial parole suitability hearing was by statutory mandate entitled to a hearing for reconsideration of that determination in the following year,

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§ 3043. By law, a release date must be chosen at the hearing, and provided to the prisoner within ten days thereafter, unless the Board determines that "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offenses, is such that consideration of the public safety requires a more lengthy period of incarceration." *Id.* § 3041(b). If a release date is chosen or confirmed, the Penal Code bars release of the prisoner until the expiration of sixty days after the date of the hearing. *Id.* If, on the other hand, the Board determines that "consideration of the public safety" prevents selection of a release date, it must inform the prisoner of the basis of its decision in writing, and offer suggestions to the prisoner on how to improve his chances of gaining release in the future. *Id.* § 3041.5(b)(2).

[11] Petitioners assert "that parole suitability hearings are convened solely to gauge the *fitness* of an inmate to have a parole hearing which in turn *might* result in the setting of a parole date for certain felons with indeterminate sentences." (Pet'rs Br. at 10.) The assertion is, at best, mistaken. The hearing at which the Board considers an inmate's fitness for parole is the sole procedural mechanism by which the parole suitability of and release date for offenders in Morales' position are determined. Cal. Penal Code § 3041(a); Cal. Code Regs. tit. 15, § 2401 (1990). If the Board finds an offender suitable for parole at such a hearing, the statute and regulations provide that "[a] parole date *shall* be set." Cal. Code Regs. tit. 15, § 2401 (emphasis added); *see* Cal. Penal Code § 3041(a). Thus, petitioners' suggestion that suitability hearings are a distinct predicate proceeding to a parole hearing is simply wrong.

and in each year thereafter. Cal. Penal Code § 3041.5(b)(2) (*see* J.A. 3). At this hearing, the prisoner was entitled to proffer any circumstances tending to support his suitability for release, *e.g.*, indications that he understands the nature and magnitude of the offense; evidence that he committed the crime as the result of significant stress in his life; evidence that his age reduces the probability of recidivism; evidence that he has made realistic plans for release; evidence that he has developed marketable skills that can be put to use upon release; or evidence that his activities while institutionalized indicate an enhanced ability to function within the law upon release.[12]

The 1981 amendment, however, withdrew this annual entitlement for persons convicted of more than one offense involving the taking of a life, instead permitting the Board to forego reconsideration hearings for as many as three years following a hearing at which parole suitability is denied. Now, only if such persons are able to convince the Board of Prison Terms that it is "reasonable to expect that parole [will] be granted at a hearing during the following years" can they be assured of the annual consideration hearings to which they were previously entitled by statute. As the Ninth Circuit observed, § 3041.5(b)(2), as amended, "permits the Board to frustrate a prisoner's interest in obtaining a parole release date for three times as long as was permitted by prior law."

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[12] Cal. Code Regs. tit. 15, § 2402(d)(3)-(4), (6)-(8) (1990). This list is inclusive, not exhaustive. *See id.* § 2402(d). The applicable regulations permit the offender to proffer other changed circumstances tending to demonstrate his suitability for parole, such as terminal illness, a need to care for a disabled or ill relative, breakthroughs in psychological or pharmacological treatment, or selfless acts such as protecting a guard from harm from rioting prisoners.

Watson v. Estelle, 859 F.2d 105, 109 (1988), *vacated on other grounds*, 886 F.2d 1093 (9th Cir. 1989).[13]

A prisoner whose parole reconsideration hearings have been withdrawn under the 1981 amendment may remain technically "eligible" for parole, in the sense that his confinement may have extended beyond his "minimum eligible parole release date." *See* Cal. Penal Code § 3041(a). But technical "eligibility" for parole is meaningful only insofar as it affords the prisoner an opportunity to gain release from confinement -- that is, an opportunity to demonstrate parole suitability to the Board of Prison Terms. This opportunity can be realized only through a suitability hearing before the Board, the very hearing that the 1981 amendment denies to prisoners in Morales' position for as many as three years. As the Seventh Circuit reasoned in addressing an ex post facto claim similar to that presented here, "[e]ligibility [for parole] in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing." *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979); *see also Roller v. Cavanaugh*, 984 F.2d 120, 123 (4th Cir.) ("Eligibility without consideration is a cold comfort."), *cert. dismissed*, 114 S. Ct. 594 (1993).[14]

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[13] *See also In re Jackson*, 39 Cal. 3d at 473, 703 P.2d at 105 (change embodied in § 3041.5(b)(2) "did eliminate the possibility that a parole date would be set within the period of the postponement").

[14] Petitioners suggest that, under applicable parole suitability guidelines, Morales might not actually be released on parole until the passage of 19 years following his initial confinement and that, because of aggravating circumstances relating to Morales' offense, no "reasonable

By permitting the elimination, for as many as three years, of the annual parole suitability hearings that were required by law at the time of Morales' crime, the 1981 amendment to § 3041.5(b)(2) lengthens the period that a prisoner in Morales' position must serve in confinement following an initial denial of parole before he is again provided an opportunity to obtain early release.

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person could find that [Morales] would be ready for parole" during the period in which his right to annual suitability hearings has been eliminated. (*See* Pet'rs Br. at 21, 22 n.8.) But the guidelines to which petitioners refer are just that -- guidelines. The Board of Prison Terms may depart from the regulations' "suggested base term" to an unlimited extent merely by articulating "particular facts" which it finds justify such a departure. Cal. Code Regs. tit. 15, § 2403 (1990); *see also id.* § 2401 (parole release regulations "are guidelines only").

Moreover, the very "guidelines" to which petitioners refer indicate that Morales may be immediately parolable upon a finding of suitability. In calculating Morales' release date, any "suggested base term" of confinement derived from the Board's sentencing matrix must be reduced by Morales' 1,050 days of preconviction custody and good-time credits. *See id.* § 2411(b); R. 30 (Judgment (July 1, 1982), Ex. 1 to Return to Pet. for Writ of Habeas Corpus). Thus, Morales' suggested base term of confinement would be slightly more than 16 years and one month, not 19 years. In addition, Morales is eligible for up to 50 months of postconviction good-time credit, *i.e.*, up to four months credit for each year he has served (and possibly more, if his "performance, participation or behavior warrants"). Cal. Code Regs. tit. 15, § 2410(b). When these potential credits are deducted from his suggested base term, Morales' adjusted period of confinement is slightly less than 12 years. *See id.* § 2411. Since it is the adjusted period of confinement which governs an offender's suggested release date under the Board's own guidelines, Morales (who has already served 12 years and five months) could be parolable immediately upon a finding of parole suitability. Thus, while petitioners contend that the decision in *In re Jackson* was correct because in that case "there was . . . no evidence of any untoward effect on any *possible* release date" (Pet'rs Br. at 17) (emphasis added), such an untoward effect does exist here.

B. Retroactive Constraints On Parole Consideration, And Thus On Parole Eligibility, Violate The Ex Post Facto Clause.

Petitioners do not dispute that a State violates the Ex Post Facto Clause by retroactively eliminating or postponing a prisoner's parole eligibility. (Pet'rs Br. at 17.) Petitioners also concede that Penal Code § 3041.5(b)(2) postpones opportunities for parole consideration for prisoners in Morales' position. (Pet'rs Br. at 21-22.) Petitioners instead assert that ex post facto protection against retroactive elimination of parole eligibility is available only to those prisoners who can show that they otherwise would likely have been released. This assertion misreads the Court's precedents and distorts the applicable ex post facto standard.

When a statute retroactively forecloses opportunities for reduced or less onerous punishment, the Ex Post Facto Clause does not place the burden on the individual offender to show that he or she would have received a less onerous punishment under prior law. To the contrary, "[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular [offender]." *Weaver*, 450 U.S. at 33 (citing *Dobbert v. Florida*, 432 U.S. 282, 300 (1977)); *see also Lindsey*, 301 U.S. at 401; *Rooney v. North Dakota*, 196 U.S. 319, 325 (1905). If the "challenged provision" retroactively deprives an offender of previously accorded opportunities to gain a shorter sentence of confinement, that provision renders the imposed punishment more onerous as a matter of law.

The leading decision on this issue is *Lindsey v. Washington*, a case ignored by petitioners. *Lindsey* flatly rejected the assertion that a legislature is free retroactively to stiffen the range of possible punishments for a crime, so long as the sentences of the offenders to whom the law is applied

might have been the same under prior law. *See* 301 U.S. at 401-02. In *Lindsey*, the law in effect at the time of the petitioners' crime provided for a maximum sentence of 15 years in prison, but also permitted the sentencing court to impose a prison term of less than 15 years. Washington amended the law between the time of the petitioners' crime and the date of their sentencing to provide simply for a mandatory 15-year sentence, within which the State's Board of Prison Terms was permitted to fix the actual duration of confinement. *Id.* at 398-99. Petitioners received a 15-year maximum sentence.

Before the Court, the *Lindsey* petitioners argued that they had retroactively been deprived of the opportunity for a maximum sentence of fewer than 15 years. Brief for Petitioners at 14-15, *Lindsey*, 301 U.S. 397 (No. 660). The State's response (much like California's here) was that it was quite possible that the Lindseys would have received the same 15-year maximum sentence under the old law. *See* Answering Brief of Appellee at 21, *Lindsey* (arguing that "no court can indulge in the presumption that the court would in any given case impose a lesser maximum term"). Because the Lindseys were thus unable to show any concrete "disadvantage in the matter of the sentence imposed," the State of Washington insisted that the law did not violate the Ex Post Facto Clause. *Id.* at 45-46.

The *Lindsey* Court emphatically -- and unanimously -- rejected this argument, and reversed the petitioners' sentence. The Court focused on whether the statute retroactively increased the "standard of punishment" for the Lindseys' crime, and not at all on whether the Lindseys might (or would) have received the same quantum of punishment under the superseded law. 301 U.S. at 401. "[A]n increase in the *possible* penalty is ex post facto," the Court wrote,

"regardless of the length of the sentence actually imposed, since the *measure* of punishment prescribed by the later statute is more severe than that of the earlier." 301 U.S. at 401 (emphasis added; citations omitted).

Lindsey's treatment of the "detriment" prong of ex post facto analysis bears particular emphasis here. The Lindseys were not required to show a likelihood, or even a realistic possibility, that the judge might have sentenced them to less than the 15-year maximum punishment under the prior law. To the contrary, the Court's ruling unambiguously rests on the fact that a less onerous punishment would have been open to the sentencing judge under the superseded regime. As the Court explained, it was "plainly to the substantial disadvantage of petitioners to be deprived of all *opportunity* to receive a sentence which would [have] give[n] them freedom from custody and control prior to the expiration of the 15-year term." *Id.* at 401-02 (emphasis added); *see also id.* at 401 (the challenged law "operates to [petitioners'] detriment in the sense that the *standard of punishment* adopted by the new statute is more onerous than that of the old" (emphasis added)). Thus, it was Washington's foreclosure of the previously available opportunity that was the gravamen of the ex post facto violation in *Lindsey*, unadorned by any speculation about whether that opportunity was a likely or realistic one.

The *Lindsey* Court's focus on the "standard of punishment" imposed by a retroactive measure is faithful to the long-understood meaning, and long-practiced application, of the Ex Post Facto Clause. Historically, whether a law violated the Ex Post Facto Clause depended not on whether a given offender actually received harsher punishment than he otherwise would have, but on whether the retroactive law provided for the possibility of greater punishment, and thus

presented a risk that the offender's actual punishment might exceed that which would have been imposed under prior law. *See* WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION 253-54 (1904) (statutory changes in punishment with the *potential* to result in increased punishment, no matter to how small a degree, are invalid ex post facto laws).[15]

The unqualified nature of the Ex Post Facto Clause -- that is, its intolerance for the retroactive enhancement of punishment no matter how subtle the attempt, and no matter how compelling the proffered justification for the measure -- helps explain the historical focus (exemplified by *Lindsey*) on whether the challenged law modifies the "standard of punishment" affixed to the crime. The Constitution neither requires nor permits courts to show special solicitude for laws that enhance the *possible* range of punishments applicable to a category of crimes, and has therefore long been understood to command that any doubt about whether a particular retroactive measure has potentially enhanced an offender's punishment be resolved in favor of the offender.[16]

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[15] *E.g., Hartung v. People*, 22 N.Y. 95, 106 (1860) ("It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment, after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law.").

[16] *See, e.g., In re Petty*, 22 Kan. 477, 483 (1879) ("We have no absolute means of saying whether the old or the new law would be the more severe in a given case, and hence we cannot affirm that [the later statute] mitigates the punishment"); FRANCIS WHARTON, COMMENTARIES ON LAW § 472 (1884) (in cases where it is "a matter of dispute whether a penalty attached by a new law is severer than the penalty in force under

The principle announced in *Lindsey* has recently been reaffirmed by the Court. In *Miller v. Florida*, 482 U.S. 423 (1987), the Court held unanimously that the Ex Post Facto Clause prohibits States from depriving an offender of opportunities to obtain a shorter sentence that were available to him under the law in effect at the time of his crime. The petitioner in *Miller* was sentenced under state sentencing guidelines that prescribed a presumptive prison term of five and one-half to seven years. The guidelines in force when he committed his crime prescribed a presumptive sentence of only three and one-half to four and one-half years. Under both statutes, the judge could impose sentences outside the recommended range, provided he gave clear and convincing written reasons. *Id.* at 426-27. Florida asserted in *Miller* that the revised guidelines did not disadvantage the petitioner because he could not "show definitively that he would have gotten a lesser sentence" under the old provisions. *Id.* at 432. The Court was unpersuaded, holding that the State's assertion was plainly "foreclosed" by *Lindsey*. *Id.*

The Court's decision in *Weaver v. Graham* likewise rests on *Lindsey*'s "standard of punishment" principle. *Weaver* addressed a challenge to a retrospective Florida statute implementing a more restrictive formula for awarding inmates "gain-time" credits for time served in compliance with prison rules, and for adequate performance of prison work duties. *See* 450 U.S. at 25-26. Applying *Lindsey*, the Court held that retroactive application of this statute violated the Ex Post Facto Clause by reducing the amount of "gain-time" credits potentially available to a prisoner if he were adjudged by correctional authorities to have behaved

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the old law when the offence was committed," the issue "is to be determined in favor of the accused").

properly, even though it was sheer speculation to assume that Weaver might ultimately be awarded those credits. *Id.* at 33-34. The Court stressed that the constitutional injury was Weaver's loss of "the *opportunity* to shorten his time in prison" through potential accumulation of gain-time credits. *Id.* (emphasis added). *See also Dobbert*, 432 U.S. at 300 ("one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he *might* have received under the old") (emphasis added).[17]

Under these authorities, as Petitioners concede, a State plainly cannot, through retroactive legislation, eliminate the possibility of parole altogether. Neither can it legislate a retroactive postponement of opportunities for early release on parole. The availability and timing of opportunities for early release on parole, like statutory provisions for minimum and maximum periods of confinement, are constituent elements of the punishment prescribed for criminal acts. Just as a State

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[17] The *Lindsey* principle has been widely applied by federal and state courts when addressing statutory changes in prisoners' opportunities for reduced confinement. *See, e.g., United States v. Arzate-Nunez*, 18 F.3d 730, 734 n.2 (9th Cir. 1994) ("the ex post facto inquiry focuses on a defendant's eligibility to receive a certain sentence, not his actual sentence"), *citing United States v. Paskow*, 11 F.3d 873, 877 (9th Cir. 1993); *Watson*, 859 F.2d at 106-07 n.2 ("numerous cases establish that prisoners have an interest protected by the ex post facto clause in programs holding out the possibility of reductions in the duration of their incarceration"); *see also Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 725 (9th Cir. 1993); *Chatman v. Marquez*, 754 F.2d 1531, 1535 (9th Cir.), *cert. denied*, 474 U.S. 841 (1985); *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991); *see also Williams v. Florida Parole Comm'n*, 625 So. 2d 926, 935 (Fla. App. 1993), *review denied*, 637 So. 2d 236 (Fla. 1994), and cases cited therein.

cannot retroactively deprive an offender of opportunities to urge the sentencing judge that a shorter period of confinement should be imposed at the outset, *see Lindsey*, 301 U.S. at 401-02; *Miller*, 482 U.S. at 432-35, a State may not retroactively eliminate opportunities for a prisoner to urge the paroling authority that the statutorily permissible option of early release is appropriate in his case. Each category of retroactive legislation removes previously guaranteed opportunities to obtain reduced imprisonment, whether from the sentencing judge (as in *Lindsey* or *Miller*) or from the paroling authority (as in the case at bar).

It is no answer to say, as do petitioners (Pet'rs Br. at 22-23), that any reduction in an offender's confinement stemming from parole is purely a function of the paroling authority's exercise of *discretion*.[18] A sentencing judge exercises discretion to fix an offender's length of confinement

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[18] The federal appellate decisions denying challenges to the retroactive application of parole guidelines by the former United States Parole Commission do not support the proposition that the Ex Post Facto Clause condones retroactive postponement of parole eligibility. As this Court has recognized, most of these decisions held that the guidelines simply rationalize the exercise of previously delegated statutory discretion, or do not constitute "laws" for purposes of the Ex Post Facto Clause at all. *See Miller*, 482 U.S. at 434-35, and cases cited therein. Neither circumstance obtains here.

A few courts disposed of prisoners' ex post facto challenges to the guidelines on the ground that the guidelines do not increase punishment. *See, e.g., Yamamoto v. United States Parole Comm'n*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Dufresne v. Baer*, 744 F.2d 1543, 1547 (11th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). But these courts expressly distinguished retroactive implementation of the guidelines from a retroactive statutory restriction on the availability of parole, indicating that the latter *would* increase punishment in violation of the Ex Post Facto Clause. *See, e.g., Yamamoto*, 794 F.2d at 1300; *Dufresne*, 744 F.2d at 1549-50.

that is indistinguishable from the discretion exercised by a paroling authority to adjust the period of confinement afterward. Both the judge (under the statutes fixing minimum and maximum prison terms) and the paroling authority (under the statutes fixing an offender's eligibility for parole) adjust offenders' periods of confinement within limits established by the legislature. The only difference is that the sentencing judge operates at the front end of the process and the paroling authority at the back end. That California has chosen a regime where the Board of Prison Terms, rather than the sentencing judge, has primacy in fixing offenders' periods of confinement within legislative parameters does not affect the applicability of the Ex Post Facto Clause. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) ("[W]hat cannot be done directly [under the Ex Post Facto Clause] cannot be done indirectly. The Constitution deals with substance, not shadows.").

Measures such as the 1981 amendment to § 3041.5(b)(2), by making unavailable the only mechanism by which a prisoner can obtain parole release, deprive parole-eligible prisoners of opportunities to reduce their periods of confinement. By eliminating chances to obtain an earlier release date, such laws inevitably tend to "punish a prior act in a different and more onerous manner." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1345, at 240-41 (3d ed. 1858) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810)).[19] Here, at the time of Morales' offense, the State legislature had clearly defined the availability and timing of opportunities for consideration of early release on parole. By retroactively lengthening the period of

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[19] Likewise, such laws deprive offenders of the fair notice of the consequences of their acts which the Ex Post Facto Clause guarantees. *See Morales*, 16 F.3d at 1005 (citing *Weaver*, 450 U.S. at 30).

confinement Morales was required to serve until he could next be considered for parole release, the 1981 amendment to § 3041.5(b)(2) unconstitutionally enhanced the standard of punishment applicable to Morales' offense.[20]

C. Section 3041.5(b)(2)'s So-Called "Procedural Safeguards" Do Not Exempt It From Ex Post Facto Scrutiny.

Petitioners claim that there can be no ex post facto problem where the State implements "procedural safeguards" purportedly designed to withdraw early release opportunities only from those offenders whom the State believes are least deserving of such release. (Pet'rs Br. at 16, 21-22.) Petitioners submit that this is such a case. They point to § 3041.5(b)(2)'s requirement that the Board of Prison Terms make a finding that "it is not reasonable to expect that" the individuals for whom it is eliminating annual parole suitability hearings will be given parole dates in the interim. Cal. Penal Code § 3041.5(b)(2) (West 1982). This self-policing quality of the 1981 amendment, petitioners assert, ensures that it cannot violate the Ex Post Facto Clause.

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[20] *Amici* Criminal Justice Legal Foundation, *et al.* argue that this Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), precludes the extension of *Lindsey, Miller*, and *Weaver* to cover Morales' case because each of those cases cited the now overruled cases of *Kring v. Missouri*, 107 U.S. 221 (1803), and *Thompson v. Utah*, 170 U.S. 343 (1898). However, *amici's* arguments do not withstand scrutiny. Morales relies on *Lindsey, Miller*, and *Weaver* for the proposition that application of a harsher "standard of punishment" constitutes harsher punishment for ex post facto purposes, not for the claim that "*all* 'legislative acts'" must give fair warning of their effect. *See* Br. of *Amici* Criminal Justice Legal Foundation, *et al.* at 9. While *amici* are correct that *Lindsey, Miller*, and *Weaver* contain some *dicta* derived from *Kring* and *Thompson*, Morales need not -- and does not -- rely on the *dicta* thus derived.

Petitioners are mistaken. As emphasized earlier, this Court's decisions in *Lindsey, Miller*, and *Weaver* do not hold, or even suggest, that retroactive enhancements of punishment may be sustained as to particular offenders simply because those offenders cannot show that they would have been given a shorter period of confinement under prior law. To the contrary, if retroactive legislation deprives an offender of "all opportunity" for reduced punishment, such legislation is ex post facto whether or not the offender's actual prospects for reduced punishment are substantial. *See Lindsey*, 301 U.S. at 401-02; *cf. Rummel*, 445 U.S. at 281 ("the possibility of parole, *however slim*, serves to distinguish [the petitioner] from a person sentenced . . . without parole") (emphasis added). This is because doubts about the effect of a retroactive measure on the quantum of a particular offender's punishment -- no matter how compelling the legislative

justification for the enhancement[21] -- are to be resolved in favor of the offender. Section II(B), *supra*.

Petitioners' preoccupation with the "procedural safeguards" afforded by § 3041.5(b)(2) betrays their confusion of ex post facto with due process principles. Contrary to petitioners' suggestion, Morales need not establish a "legitimate entitlement to parole" (Pet'rs Br. at 23) in order to claim protection under the Ex Post Facto Clause against retroactive impairment of his parole eligibility. *See Weaver*, 450 U.S. at 29. As this Court announced in *Weaver*, "when a court engages in *ex post facto* analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested

[21] *Amici* Pacific Legal Foundation, *et al.* argue that retroactive application of the 1981 amendment to § 3041.5(b)(2) should be upheld as a means to spare victims' families the trouble and expense of appearing at parole hearings. (*See* Br. of *Amici* Pacific Legal Foundation, *et al.* at 22.) Such a consideration cannot overcome the Constitution's unconditional command that "no State . . . shall pass any . . . ex post facto Law." California remains free to enact prospective laws to spare victims' families the rigors of participation in the parole process. The State also has resort to myriad means to conduct annual parole hearings without the direct participation of victims' families (and without offending the Ex Post Facto Clause), such as the use of videotaped or written testimony, *see* Cal. Penal Code § 3043.2 (West Supp. 1994), and the re-use of such testimony in subsequent years.

It bears noting that California first required crime victims and their families to be notified about the scheduling of parole hearings, and to be accorded an opportunity to testify therein, in a statute enacted in 1982, *after* Morales' crime was committed. *See id.* § 3043 (1982). Clearly, the State may not bootstrap its alleged need to address a "problem" created by a statute enacted *after* Morales' crime into a justification for retroactive criminal legislation.

rights." *Id.* at 29-30 n.13. Thus, although § 3041.5(b)(2)'s procedures may be sufficient to preserve Morales' *due process* rights to parole (such as they are), they are wholly incompetent to protect his ex post facto rights against subjection to a statute that "assigns more disadvantageous criminal or penal consequences" to prior acts. *Id.*

In any event, the findings required by § 3041.5(b)(2) do not truly provide procedural safeguards, because they fail meaningfully to distinguish the offenders for whom deferral of eligibility is ordered from those for whom it is not. California's Attorney General conceded as much in his argument to the California Supreme Court in *In re Jackson*, complaining -- with respect to the 1982 amendment to § 3041.5(b)(2) that permitted deferrals of parole suitability hearings for as many as two years for all prisoners -- that the standard for determining a prisoner unsuitable for parole and the standard for determining a prisoner suitable for deferral of parole hearings were virtually identical. The Attorney General concluded that it was absurd to require the Board to issue separate findings as to its application of the two standards. *See In re Jackson*, 39 Cal. 3d at 478, 703 P.2d at 109 ("The Attorney General argues that it is not rational to require two separate statements since such a requirement is 'virtually impossible' to comply with. In his view, '[both] the decision to deny parole and to delay a subsequent hearing for two years must be the same.'").[22]

[22] Morales' own experience illustrates how the two standards are conflated in practice. The Board made four findings to support its denial of parole (as opposed to its postponement decision) at Morales' 1989 hearing: (1) that his crime was "heinous, atrocious and cruel"; (2) that he had a prior record of violent behavior, namely, his prior murder conviction and violation of parole by committing a second murder; (3) he had not participated in beneficial therapy programs while incarcerated;

State and federal courts have uniformly condemned retroactive laws withdrawing or postponing parole eligibility, even where the State has purported to limit eligibility only for those offenders deemed least suitable for release. The great weight of authority holds that a State may not retroactively change a prisoner's initial parole eligibility date, regardless of whether the prisoner's petition for parole release would likely be granted on or about the date of initial eligibility.[23] Similarly, the courts are nearly unanimous in finding ex post facto violations in the circumstances presented here, *i.e.*, when the State retroactively reduces the frequency of a parole-eligible prisoner's consideration for release. Again, the courts have so held without regard to whether the prisoner can demonstrate a likelihood of attaining parole during the period in which the opportunity for consideration is eliminated.[24]

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and (4) "[p]sychiatric factors." (*See* Pet'rs Br. at 7-8.) These findings track the parole guidelines for life prisoners published in the California Code of Regulations. *See* Cal. Code Regs. tit. 15, § 2402(c) (1990). The Board then essentially listed the same factors in support of its decision to deny Morales parole review for the *next* three years. (*See* Pet'rs Br. at 9.) The Board engaged in no independent factfinding at all, preferring -- in fulfillment of the California Attorney General's prophecy in *In re Jackson* -- to let its finding of Morales' current unsuitability for parole do double duty in supporting application of § 3041.5(b)(2)'s three-year deferral provision.

[23] *See Yamamoto v. United States*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 1100 (1973); *Fender v. Thompson*, 883 F.2d 303, 307 (4th Cir. 1989); *Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 343 (10th Cir. 1989); *Beebe v. Phelps*, 650 F.2d 774, 777 (5th Cir. Unit A 1981); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 266 (3d Cir. 1978), *rev'd on other grounds*, 445 U.S. 388 (1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977); *State v. Beachman*, 189 Mont. 400, 406, 616 P.2d 337, 340-41 (1980); *Davis v. Mabry*, 266 Ark. 487, 491, 585 S.W.2d 949, 951-52 (1979); *State v. Mendivil*, 121 Ariz. 600, 602, 592 P.2d 1256, 1258 (1979); *Lee v. State*, 294 So. 2d 305, 306 (Fla. 1974); *State ex rel. Mueller v. Powers*, 64 Wis. 2d 643, 646-47, 221 N.W.2d 692, 694 (1974); *In re Griffin*, 63 Cal. 2d 757, 760, 408 P.2d 959, 961 (1965); *Goldsworthy v. Hannifin*, 86 Nev. 252, 257, 468 P.2d 350, 353-54 (1970); *State ex rel. Woodward v. Board of Parole*, 99 So. 534, 536 (La. 1924); *but see Zink v. Lear*, 28 N.J. Super. 515, 101 A.2d 72 (1953) (changes to parole eligibility dates may be made retroactively).

[24] *See Morales*, 16 F.3d at 1000; *Roller*, 984 F.2d 120 (reduction in frequency of parole hearings from every year to every other year); *Akins v. Snow*, 922 F.2d 1558 (11th Cir.) (reduction in frequency of parole hearings from every year to every 8 years), *cert. denied*, 501 U.S. 1260 (1991); *Watson*, 859 F.2d 105 (1981 amendment to § 3041.5(b)(2)); *Rodriguez*, 594 F.2d 170 (parole hearings reduced from every six months to every eighteen months); *State v. Reynolds*, 642 A.2d 1368, 1370 (N.H. 1994) (right to petition for sentence suspension changed from every two years to every four years); *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993) (parole hearings reduced from every year to every other year), *cert. denied*, 114 S. Ct. 924 (1994); *Tiller*, 138 Ill. 2d 1, 9-11, 561 N.E.2d 561, 578-80 (1990) (parole hearings reduced from every year to every three years if it is found "not reasonable to expect that parole would be granted" in intervening years); *see also State ex rel. Mueller*, 64 Wis. 2d 463, 466-67, 221 N.W.2d 692, 694 (1974) ("Although the decision to refuse or grant parole lies within the discretion of the department [of parole], Wisconsin law grants petitioners as a matter of right the opportunity to be considered for parole after serving a given period of time."); *State ex rel. Woodward v. Board of Parole*, 99 So. 534, 536 (La. 1924) ("[petitioner's] privilege of having his case submitted to the discretion of the board at the proper time" may not be removed retrospectively); *but see In re Jackson*, 703 P.2d at 105 (changing frequency of parole suitability hearings from every year to every other year held not significant enough to violate Ex Post Facto Clause).

In *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992), the court declined to invalidate a statutory reduction in Minnesota's parole hearing frequency. Judge

D. Petitioners Cannot Insulate The 1981 Amendment To § 3041.5(b)(2) From Ex Post Facto Scrutiny Merely By Labelling The Change "Procedural."

Petitioners attempt to save the 1981 amendment to § 3041.5(b)(2) by terming its effect "merely procedural" (Pet'rs Br. at 23), and thus outside the proscription of the Ex Post Facto Clause. This Court has rejected such formalistic arguments in the past, and should reject petitioners' suggestion here.

"[S]imply labelling a law 'procedural' . . . does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Collins v. Youngblood*, 497 U.S. at 46. To the contrary, a change in a law that alters punishment "can be *ex post facto* 'even if the statute takes a seemingly procedural form.'" *Miller*, 482 U.S. at 433 (quoting *Weaver*, 450 U.S. at 29 n.12). As the Ninth Circuit observed in an opinion that presaged its later judgment in *Morales*, "[t]he distinction between 'procedure' and 'substance' is a commentary on the basic inquiry rather than a separate doctrine." *Watson*, 859 F.2d at 107 n.3. The essential ex post facto inquiry remains whether the "standard of punishment" imposed by retroactive legislation is more onerous than the predecessor statute; if it is, the statute cannot retroactively be applied to an offender

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Bowman's opinion announcing the judgment of the court noted that the change in frequency was based on a change in Minnesota's hearing frequency regulations, which he found not to constitute laws for purposes of the Ex Post Facto Clause. *Id.* at 1157. No other judge concurred in this reasoning, however. *See id.* (Stuart, J., concurring in result); *id.* at 1158-59 (Lay, J., dissenting) (noting that in *Yamomoto*, 794 F.2d at 1300-01, the Eighth Circuit observed that "[a]dverse changes in the frequency with which a prisoner may be *considered* for parole . . . may also violate the ex post facto clause").

whether or not it takes a "procedural" form. Thus, the Court has regularly struck down seemingly "procedural" changes in penal statutes where those changes have the effect of "mak[ing] more burdensome the punishment for a crime" after its commission.[25]

The 1981 amendment to § 3041.5(b)(2) has precisely that effect on the punishment of offenders in Morales' position. Although the amendment technically targets parole *procedures*, its effect on the category of offenders to which it is directed is undeniably *substantive* -- that is, it serves to lengthen offenders' required periods of confinement prior to renewed parole availability.

The retroactive criminal statutes that the Court has sustained against ex post facto challenges illustrate the gulf between the 1981 amendment to § 3041.5(b)(2) and genuinely "procedural" measures. The latter are directed to the manner in which a criminal case is *adjudicated* rather than to the manner in which a previously committed offense is *punished*. *See Collins*, 497 U.S. at 45 ("changes in the procedures by which a criminal case is adjudicated" are generally immune from ex post facto scrutiny); *Dobbert*, 432 U.S. at 293-94 ("The new statute simply altered the methods

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[25] *See, e.g., Miller*, 482 U.S. at 433-34 (sentencing guidelines amendment defended as "procedural" in nature held violative of the Ex Post Facto Clause where amendment "was intended to, and did, increase the 'quantum of punishment'"); *Weaver*, 450 U.S. at 36 n.21 (State's claim that statute altering gain-time computation "is merely procedural" rejected in view of statute's effect on quantum of punishment for offenses previously committed); *cf. Cummings v. Missouri*, 71 U.S. (4 Wall.) at 318, 321, 325 (loyalty oaths, though technically "qualification[s] for holding certain offices," violated Ex Post Facto Clause because they effectively imposed additional "deprivation" on the basis of prior conduct).

employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."); *Hopt v. Utah*, 110 U.S. 574 (1884) (retrospective statute making admissible testimony by felons held to be directed to methods of adjudication); *Thompson v. Missouri*, 171 U.S. 380 (1898) (retrospective statute making handwritten documents admissible for use as handwriting exemplars held procedural); *Beazell v. Ohio*, 269 U.S. 167 (1925) (retrospective statute eliminating right to separate trial for co-conspirators held procedural); *Malloy v. South Carolina*, 237 U.S. 180 (1915) (retrospective statute substituting one form of evidence for another held procedural). Changes in adjudicatory procedures, while arguably disadvantageous to the occasional specific defendant, do not disadvantage the entire category of offenders to which they apply.[26] Because the adjudicatory procedures in force in a given jurisdiction therefore cannot be thought to influence an offender's primary conduct, changes in those procedures do not implicate the fair notice concerns that are at the core of the Ex Post Facto Clause. *See, e.g., Dobbert*, 432 U.S. at 297-98, 301.

The 1981 amendment to § 3041.5(b)(2) does not retroactively change the way criminal cases are *adjudicated*.

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[26] For instance, in *Dobbert*, the Court concluded that the challenged retrospective legislation making advisory (rather than mandatory) a sentencing jury's determination as to whether the death penalty or life imprisonment should be imposed could well spare a defendant of what would otherwise be a binding jury determination of death just as frequently as it could result in judicial rejection of a jury recommendation of life. *See* 432 U.S. at 294-97. Thus, even though the petitioner in *Dobbert* had been sentenced to death by the trial judge in derogation of a jury recommendation of life imprisonment, the Court rejected the petitioner's contention that the legislation violated the Ex Post Facto Clause. *Id.*

Instead, the amendment retroactively changes the way prisoners in Morales' position are *punished* by lengthening prisoners' required periods of incarceration prior to renewed opportunities for parole. Unlike the "procedural" enactments the Court has sustained against ex post facto challenges, the 1981 amendment disadvantages *all* offenders to whom it applies. The amendment has none of the potentially ameliorative qualities that characterize permissible retroactive changes in criminal adjudicatory procedures. Like many other changes in so-called "procedures" governing prisoners that the Court has addressed over the years, the 1981 amendment to § 3041.5(b)(2) is undeniably substantive in effect, and may not be applied retroactively. *See, e.g., In re Medley*, 134 U.S. 160 (1890) (retroactive requirement that prisoners on death row be placed in solitary confinement pending execution held violative of Ex Post Facto Clause); *Weaver*, 450 U.S. at 30 (retroactive change in procedure for calculating gain-time credits held to be ex post facto as to prisoners sentenced prior to enactment).

III. THERE IS NO *DE MINIMIS* EXCEPTION TO THE EX POST FACTO CLAUSE.

At bottom, petitioners and their supporting *amici* urge the creation of a *de minimis* exception to the ex post facto prohibition. They request, in substance, that the Court sustain retroactive application of § 3041.5(b)(2) because it operates to defer parole eligibility only for a class of prisoners whose chances of actually receiving parole are slim anyway. (*See, e.g.*, Pet'rs Br. at 21-23.) The suggestion should be rejected. Nothing in the text or history of the Constitution, the decisions of this Court, or the principles animating the Ex Post Facto Clause even intimates that retroactive enhancements in punishment may be imposed provided the enhancements are small.

The Court has refused to sanction retrospective enhancements in punishment even of modest proportions. In *In re Medley*, the Court struck down a retroactive state law that required offenders sentenced to death to be housed in solitary confinement prior to their execution, ruling that the imposition of confinement away from other prisoners "was an additional punishment" violative of the Ex Post Facto Clause. 134 U.S. at 171. The *Medley* Court found an additional ex post facto violation in the law's retroactive requirement that death row prisoners be informed only of the specific week within which their execution was set, rather than the specific date of execution. *Id.* at 172-73. The Court reached these results over the vigorous objections of two dissenting justices who explicitly urged recognition of a *de minimis* exception to the ex post facto proscription that would shelter what they termed to be "trifling" enhancements. *See id.* at 175 (Brewer, J., dissenting).

Thus, whether the range of confinement prescribed for a particular offense is enhanced dramatically by multiples of years, or marginally by multiples of days, the Ex Post Facto Clause enjoins its accomplishment retroactively. And whether a statute heightening the "standard of punishment" has certainly, likely, possibly, or even remotely increased the actual punishment given a particular offender is irrelevant for purposes of applying the Ex Post Facto Clause. *Cf. Lindsey*, 301 U.S. at 401-02. As the Court observed in *Collins*, "[s]ubtle ex post facto violations are no more permissible than overt ones." 497 U.S. at 46.[27]

[27] Petitioners assume that because only a small percentage of the offenders subject to the 1981 amendment might, as a consequence, serve longer periods of confinement, the provision is somehow insulated from condemnation under the Ex Post Facto Clause. This contention has no basis in the Court's decisions. The important question, as this Court has emphasized, is whether punishment *for the category of offenders to which the retroactive law applies* has been enhanced. If it has, the law violates the Ex Post Facto Clause, no matter how small the number of offenders whose actual punishment turns out to exceed that which they would have obtained under the prior law. Notably, petitioners do not take the position that offenders in Morales' position have no chance of gaining release on parole during the period of their terms of imprisonment.

Petitioners' *de minimis* approach would also be impossible to implement. This case amply illustrates the difficulty. The 1981 amendment to § 3041.5(b)(2) purports to distinguish between prisoners who have twice been convicted of an offense involving the taking of a human life and other prisoners, finding the former to be somehow uniquely unsuitable for annual parole consideration. Yet petitioners offer no principle by which a court could conclude that offenders in Morales' position are categorically unsuitable for parole vis-a-vis others who have been convicted of homicides, or even others who have been convicted of serious crimes, especially when the applicable state law makes all such offenders eligible for parole.

While the 1981 amendment decrees that a three-year delay in parole consideration hearings is appropriate for offenders in Morales' position, and possibly may not lengthen the confinement of any offender subject to it, there is no principled way to determine how significant a risk of enhanced confinement is to be tolerated through such hearing delays. Inevitably, as the period between parole hearings lengthens, the number of prisoners who might otherwise have been paroled in the interim in view of changed circumstances grows larger. A prisoner who might not have made sufficient progress toward rehabilitation in three years might well be able to demonstrate such progress in five years, or eight

years, or ten years, and be able to urge these facts to the paroling authority in support of early release.

Petitioners claim that a statute affecting the timing of parole hearings crosses the *de minimis* threshold only when it affects the parole eligibility of offenders whose chances of parole release are deemed genuine or "reasonable." They further assert that courts are competent to police such statutory changes, and to enjoin application of retroactive postponements of parole consideration to offenders whose factual prospects of parole meet this undefined constitutional minimum. (Pet'rs Br. at 19-23.) But it is too much to ask a court, as a necessary first step in the resolution of an ex post facto claim, to engage in a speculative assessment of the likelihood that an offender will be able to convince a paroling authority to exercise its discretion in favor of release if more frequent parole consideration hearings are provided. Under petitioners' regime, courts would be required to act as rump parole boards -- and to determine the factual prospects for early release -- in order to resolve each and every prisoner's ex post facto claim growing out of statutory postponements of parole consideration. To make matters worse, courts would likely face this routine with respect to *each* prisoner whose hearings are deferred under provisions such as § 3041.5(b)(2), and with respect to *each and every* successive deferral decision, given that a prisoner's factual prospects for release typically change over time.

Expending judicial resources in this fashion would not only be wasteful in the extreme, but also would involve the judiciary in inquiries that are not properly "judicial" in nature. In California, as in other States, the parole decision "'involves the deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and

of the public.'" *In re Powell*, 45 Cal. 3d 894, 902, 755 P.2d 881, 886 (1988). The endeavor required by petitioners' approach -- unguided speculation concerning how a paroling authority might apply its broad discretion as time unfolds, or as new facts and circumstances suggesting a prisoner's further rehabilitation emerge -- is simply not within the institutional competence of the courts. Where, as here, a decision has been committed to the near-absolute discretion of an administrative body, there are no judicially manageable standards by which a court can assess the likelihood that such discretion will be exercised one way or the other. *See Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987) ("parole release decisions are inherently subjective and predictive"); *id.* at 384 (O'Connor, J., dissenting) ("An appellate court reviewing the decision of the [Parole] Board that release of a prisoner would not be 'in the best interests of society' or would be 'detriment[al] . . . to the community' would have little or no basis for taking issue with the judgment of the Board.").

The experiences of other courts illustrate the difficulty of drawing a *de minimis* line. The one court to uphold a retroactive change in the frequency of parole consideration hearings (from once yearly to once every two years) found the ex post facto question "close," but sustained the law in the belief that it did not "significantly impair[]" a prisoner's opportunity for release. *In re Jackson*, 39 Cal. 3d at 472, 476, 703 P.2d at 105, 109. In so deciding, the Supreme Court of California observed:

> Obviously, the right to be heard is an important right. Restrictions on this right may have significant consequences. For this reason, not every retrospective encroachment on the right to

> annual review will pass muster under ex post facto principles as "merely procedural."

39 Cal. 3d at 477 n.12, 703 P.2d at 108 n.12. Perhaps because *Jackson* was the first case to address a retroactive change in the frequency of parole hearings, the *Jackson* majority failed to anticipate the inexorable legislative demands for further "retrospective encroachment on the right to annual review" that would be unleashed by judicial approval of the practice. Predictably, in the wake of *Jackson* California has moved well down the slippery slope. In 1981, the California Legislature approved the law at issue here, permitting three-year postponements for those convicted of two offenses involving the taking of human life. It quickly followed that legislation with permission to make two-year postponements for any offender. And effective January 1, 1995, California will permit five-year deferrals of parole consideration for *any* prisoner convicted of murder. In light of what petitioners themselves describe as "the national trend toward . . . harsher penalties and conditions of confinement for offenders and inmates" (Pet'rs Br. at 11), this progression is hardly surprising.[28]

The Supreme Court of South Carolina originally followed California's lead, upholding a one-year postponement provision on the grounds that the change had little effect on punishment, and so was "procedural." *See Gunter v. State*, 378 S.E.2d 443, 444 (S.C. 1989). A few

[28] Nor was such a pattern of creeping retroactivity beyond the foresight of the Founding Fathers. As James Madison wrote long ago on the subject of ex post facto legislation, "one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." THE FEDERALIST NO. 44, at 283 (James Madison) (Clinton Rossiter ed., 1961).

years later, however, in *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993), *cert. denied*, 114 S. Ct. 924 (1994), South Carolina reversed course, concluding that it was logically impossible to exempt from ex post facto analysis laws postponing parole review for even a single year. The unanimous South Carolina court observed that the Georgia law at issue in *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991), which allowed parole authorities to postpone hearings for up to eight years, "was an example of how a procedural change could be expected to have substantive effect." 433 S.E.2d at 864. Further, the court observed that if an eight-year retroactive postponement of parole consideration violated the Ex Post Facto Clause, there could be no principled rationale for permitting even a one-year postponement:

> It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the ex post facto analysis between a change in standards for review and a procedural change in timing. . . . We must now acknowledge that where a procedural rule is so overly intrusive that it substantively affects the review standard, it then becomes an ex post facto violation.

Id.

There is, in short, no principled means of distinguishing between statutes that retroactively defer parole review for "just a few" years and those that effect deferral for many years. A prisoner's statutory eligibility for parole is part of his punishment for ex post facto purposes, and such eligibility may not be deferred by States in the guise of retroactive constraints on the frequency of parole consideration hearings.

CONCLUSION

The Court of Appeals for the Ninth Circuit properly held that a State cannot retroactively delay a prisoner's statutorily mandated parole hearings without violating the Ex Post Facto Clause. A prisoner's statutory eligibility for parole release is an integral and important mitigating aspect of punishment. Retroactive delays in parole hearings make punishment more onerous by eliminating opportunities for release. Contrary to petitioners' assertion, the Ex Post Facto Clause does not place the burden on the offender to show what punishment he or she would have received under the less onerous prior law. Rather, an ex post facto violation occurs whenever a State retroactively prescribes a more onerous standard of punishment, and applies that new standard to prior acts. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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